United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7658

United States Court of Appeals

FOR THE SECOND CIRCUIT

DOCKET NO. 75-7658

RALPH J. LOMBARDI,

Appellant

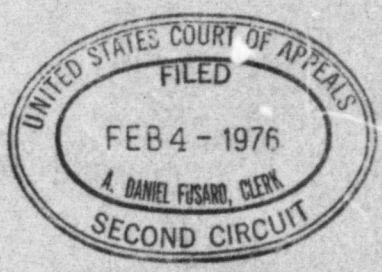
v.

CHARLES BOCKHOLDT,
NORMAN EBENSTEIN, ATTY.,
JAMES F. COLLINS, JUDGE,
CHARLES S. HOUSE, JUDGE,
ALVA P. LOISELLE, JUDGE,
HERBERT S. MACDONALD, JUDGE,
JOSEPH W. BOGDANSKI, JUDGE,
JOSEPH S. LONGO, JUDGE, and
M. JOSEPH BLUMENFELD, U.S.D.J.,

Appellees

BRIEF OF THE APPELLEE, NORMAN EBENSTEIN

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT



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INDEX

TABLE OF AUTHORITIES CITED

STATUTES AND RULES

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the District Court err in dismissing this § 1983 action pursuant to Rule 12(b)(6) on the grounds that the defendants either were immune from suit or had not acted under color of state law?

II. Did the District Court err in denying plaintiff's "DECLARATION OF DISQUALIFICATION," a motion in which plaintiff "declared" the Honorable M. Joseph Blumenfeld "disqualified" to hear the case?

STATEMENT OF THE CASE

Ralph J. Lombardi appeals[1] from a judgment of the United States District Court for the District of Connecticut, Honorable M. Joseph Blumenfeld, dismissing this § 1983 action on the grounds that the defendants either were immune from suit or had not acted under color of state law. In addition, Lombardi contends that the District Court erred in denying a "Declaration of Disqualification", a motion in which Lombardi "declared" the Honorable M. Joseph Blumenfeld "disqualified" to hear the case.

This litigation began in 1967 when Lombardi filed a civil action in the Connecticut Superior Court against Charles Bockholdt, claiming damages for alleged criminal conversation with Lombardi's wife and alienation of her affections. In 1974, the Supreme Court of Connecticut affirmed a trial court judgment in favor of Charles Bockholdt. *Lombardi* v. *Bockholdt*, 36 Conn. L. J. No. 25, pp. 6-7 (Dec. 17, 1974).

On July 1, 1975, Lombardi filed in the United States District Court for the District of Connecticut a pro se complaint, captioned "CIVIL AND CRIMINAL", alleging that Bockholdt, Bockholdt's trial attorney, the trial judge, and five Justices of the Supreme Court of Connecticut had conspired to deprive Lombardi of his "Natural and Constitutional Rights." Lombardi's prayers for relief included: (1) a request that the court initiate criminal prosecutions; (2) a claim for compensatory and punitive damages in the amount of EIGHTY-EIGHT MILLION ($88,000,000.00) DOLLARS; (3) a request for a competent judge; (4) a claim for an injunction barring the trial judge and the Justices of the Supreme Court of Connecticut from hearing

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[1] On November 24, 1975, Lombardi filed an interlocutory appeal from an order of the District Court denying Lombardi's "Declaration of Disqualification," a motion in which Lombardi "declared" the Honorable M. Joseph Blumenfeld "disqualified" to hear the case. On December 9, 1975, this Court dismissed the appeal, treated the appeal papers as a petition for a writ of mandamus, and denied that petition. *Lombardi v. Bockholdt*, No. 75-7658 (2d Cir. Dec. 19, 1975).

or deciding any cases; and (5) a request for an order requiring review of all decisions of the trial judge and the Justices of the Supreme Court of Connecticut issued subsequent to their decisions in Lombardi's case.

All defendants filed motions pursuant to Rule 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief could be granted. On August 25, 1975, after the motions to dismiss had been filed, appellant noticed the depositions of all defendants for August 30, 1975. In response, certain defendants filed motions to quash or stay the depositions pending a ruling on the motions to dismiss. On August 28, 1975, Judge Blumenfeld entered an order staying all depositions until further order of the Court.

Lombardi filed a "Declaration of Disqualification" [illegible] on September 3, 1975. In that document, Lombardi "declared" Judge Blumenfeld disqualified to hear the case for three reasons: first, for allegedly "ignoring" Lombardi's motion to enjoin the judges from acting in a judicial capacity; second, for entering the order staying depositions without allowing Lombardi the opportunity to object; and third, for allegedly ordering Lombardi to leave Judge Blumenfeld's office on August 28, 1975, when Lombardi attempted to engage Judge Blumenfeld in an *ex parte* conversation relating to the depositions. In the "Declaration", Lombardi also attempted to "designate" Judge Blumenfeld as a defendant in the case. And, in all succeeding papers filed by Lombardi, Judge Blumenfeld's name appears in the case caption as a defendant.

On September 29, 1975, Lombardi filed in the United States District Court for the District of Connecticut a second complaint, again captioned "Civil and Criminal," in which Lombardi attempted to state a cause of action against Judge Blumenfeld by asserting a host of unfounded and imaginary charges.

On the same day, one Andrew J. Melechinsky, Sr., who earlier had been denied permission to file an appearance in

the original case, filed an "Amicus Curiae Brief" in which he purported to "enter" the original case as an "intervenor in order to point out errors of the Court which violate the civil and constitutional rights of the Plaintiff RALPH J. LOMBARDI, co-counsel ANDREW J. MELECHINSKY, and of We the People." In that brief, Melechinsky made unfounded and imaginary charges against not only Judge Blumenfeld but also Judge Clarie and Mr. William Templeton, Deputy Clerk of the Court.

On September 29, 1975, Judge Blumenfeld denied Lombardi's "Declaration of Disqualification". Subsequently, on November 17, 1975, Judge Blumenfeld granted the motions of all defendants to dismiss the original action; this appeal followed.

ARGUMENT

I. The District Court properly dismissed this § 1983 action pursuant to Rule 12(b)(6) on the grounds that the defendants either were immune from suit or had not acted under color of state law.

Although the complaint cites a number of civil and criminal statutes, only 42 U. S. C. § 1983 would furnish any ground for a claim against the defendants.[2] The trial judge and the Justices of the Supreme Court, all of whom acted within their jurisdiction, are immune from suit under § 1983. *Pierson v. Ray*, 386 U. S. 547, 553-54 (1967); *John-*

[2] The complaint makes no reference to 42 U. S. C. § 1985 (3), and it is clear that the complaint states no cause of action under that statute. To be sure, § 1985 (3) does not contain the color of state law requirement contained in § 1983. *Griffen v. Breckenridge*, 403 U.S. 88, 101 (1970). But it is clear that § 1985 (3) would not reach the conspiracy alleged here. In *Griffen*, the Court restricted the scope of § 1985 (3) to private conspiracies motivated by "some racial, or perhaps otherwise class-based invidiously discriminatory animus***." [403 U.S. 88, 102 (1970)]. Since neither racial nor class-based animus is alleged, the complaint fails to state a claim under § 1985 (3). *See, Denman v. Leedy*, 479 F.2d 1097, 1098 (6th Cir. 1973); *Bricker v. Crane*, 468 F.2d 1228, 1232-33 (1st Cir. 1972); *Hughes v. Ranger Fuel Corp. Division of Pittston Co.*, 467 F.2d 6, 9-10 (4th Cir. 1972).

son v. Reagan, 524 F.2d 1123, 1124 (9th Cir. 1975); *Glasspole v. Albertson,* 491 F.2d 1090, 1091 (8th Cir. 1974); *Hill v. McClellan,* 490 F.2d 859, 860 (5th Cir. 1974); *Fanale v. Sheehy,* 385 F.2d 866, 868 (2d Cir. 1967). The District Court, therefore, properly dismissed the action as to those defendants.

The complaint is devoid of any allegation that either the defendant Ebenstein or the defendant Bockholdt acted under color of state law, a prerequisite to liability under § 1983. *Adickes v. Kress & Co.,* 398 U. S. 144, 150 (1970). The participation by the defendant attorney Ebenstein in state court litigation does not constitute action under color of state law. *Hansen v. Ahlgrimm,* 520 F.2d 768, 770 (7th Cir. 1975); *Glasspole v. Albertson,* 491 F.2d 1090, 1091 (8th Cir. 1974); *Hill v. McClellan,* 490 F.2d 859, 860 (5th Cir. 1974); *Page v. Sharpe,* 487 F.2d 567, 570 (1st Cir. 1973); *Szijarto v. Legeman,* 466 F.2d 864 (9th Cir. 1972); *Brown v. Dunne,* 409 F.2d 341, 343-44 (7th Cir. 1969). And, Bockholdt's party status in the litigation does not constitute action under color of state law. *See, Glasspole v. Albertson,* 491 F.2d 1090, 1091 (8th Cir. 1974). Finally, the allegation that Ebenstein and Bockholdt conspired with the trial judge and the Justices of the Supreme Court fails to satisfy the color of state law requirement. Private persons cannot be held liable for conspiracy under § 1983 where the alleged co-conspirators are state officials who are immune from suit for the acts upon which the conspiracy claim is based. *Hansen v. Ahlgrimm,* 520 F.2d 768, 770-71 (7th Cir. 1975); *Sykes v. California (Dep't of Motor Vehicles),* 497 F.2d 197, 202 (9th Cir. 1974); *Hill v. McClellan,* 490 F.2d 859, 860 (5th Cir. 1974); *Guedry v. Ford,* 431 F.2d 660, 664 (5th Cir. 1970); *Brown v. Dunne,* 409 F.2d 341, 344 (7th Cir. 1969); *Haldane v. Chagnon,* 345 F.2d 601, 603-04 (9th Cir. 1965). Given the immunity of the state officials and the absence of any action under color of state law by the de-

fendants Ebenstein and Bockholdt, the District Court properly dismissed the complaint.

II. The District Court properly denied the "Declaration of Disqualification."

Putting aside Lombardi's failure to comply with 28 U. S. C. § 144, and construing the allegations of the "Declaration of Disqualification" in the light most favorable to Lombardi, there were three grounds advanced for disqualification of Judge Blumenfeld.

First, Lombardi claims that Judge Blumenfeld ignored the motion for an injunction barring the judges from acting in a judicial capacity. Even assuming Lombardi's standing to seek such extraordinary relief, if Judge Blumenfeld did ignore that motion, he certainly acted correctly in light of the anti-injunction statute, 28 U. S. C. § 2283.

Second, Lombardi claims that Judge Blumenfeld acted improperly in ordering the stay of depositions without allowing appellant the opportunity to object. This claim is plainly frivolous. Given the short period of time in which Judge Blumenfeld had to act and the Labor Day Weekend date of the depositions, he did not act improperly in staying the depositions without scheduling a special hearing for argument.

Finally, Lombardi claims that Judge Blumenfeld acted improperly in refusing to engage in an *ex parte* conversation. This claim stems from Lombardi's misunderstanding of the ethical duties of a judge. See Canon 3(A)(4), Code of Judicial Conduct of the American Bar Association (1972).

CONCLUSION

For these reasons, the appellee, Norman Ebenstein, respectfully requests that the Court affirm the judgment of the District Court.

Respectfully submitted,

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PROOF OF SERVICE

We, William R. Moller and Maurice T. FitzMaurice, counsel for the Appellee, Norman Ebenstein, hereby certify that, on the 3rd day of February, 1976, we served two copies of the foregoing brief by mailing the same in duly addressed envelopes, with postage prepaid to: Ralph J. Lombardi, 224 South Elm Street, Windsor Locks, Connecticut 06096, Carl J. Ajello, Attorney General of the State of Connecticut, 30 Trinity Street, Hartford, Connecticut and John P. McKeon, Esquire, 750 Main Street, Hartford, Connecticut 06103.